(3)

No. 91-800

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CUMBERLAND & OHIO CO.
OF TEXAS, INC., *Petitioner*

v.

FIRST AMERICAN NATIONAL BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

Several of the Respondent's arguments in its Brief in Opposition are new or require comment because they mischaracterize matters relevant to this Court's consideration of the Petition. Petitioner responds to the Brief in Opposition as follows:

1. Liberal certification of state law issues in diversity actions will not place an undue burden upon the judicial system and will clearly promote the policies underlying Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

The Respondent mischaracterizes the Petitioner's brief as a request to abandon this Court's opinions in Lehman Brothers v.Schein, 416 U.S. 386 (1974) and in Salve Regina College v. Russell, 111 S. Ct. 121 (1991). To the contrary, this Court should re-visit the issue of certification to frame guidelines which would increase the use of this procedure in instances where the federal appellate courts might otherwise unnecessarily attempt to predict state law.

The increased federal appellate review of state law which Salve requires brings with it the increased risk that the federal and state intermediate appellate courts will not predict or apply state law consistently prior to the issuance of a decision by the state court of last resort. Prior to a final determination by the state court of last resort, the federal and state appellate courts are at liberty to reach independent determinations of state law.- The adoption of the standards proposed by the Petitioner will tend to minimize the possible development of inconsistent federal and state interpretations of state law; will minimize the likelihood of forum shopping; and will reserve for the states the opportunity for their courts to establish their law. Petitioner does not suggest that the federal courts are incapable of accurately forecasting state law. However, the most accurate and the only definitive determination of state law can only derive from the state court of last resort.

Respondent argues that the Petitioner's proposed guidelines would unnecessarily burden the judicial system. The burden, if any, imposed by these standards is far outweighed by the certainty and judicial efficiency that would result from a final determination of state law by the state; by increased comity within our dual system of courts; and by the fact that the policies of Erie would be maximized.

Respondent also argues that the Sixth Circuit's opinion "does not conflict with any opinion of the Tennessee Supreme Court and accordingly will not promote forum-shopping." (Brief in Opposition, p. 9, emphasis added). In this case, the Sixth Circuit has rejected an intermediate state appellate decision which was specifically on point in order to predict how it felt the Tennessee Supreme Court would rule. It is the existence of inconsistent determinations between the federal and state intermediate appellate courts which pose the risk of forum shopping. Once the state court of last resort determines a state law issue, Erie mandates that the federal appellate court is bound by that determination.

2. The issues which the Sixth Circuit refused to certify are the type of important state law issues which require certification.

Respondent asserts that this is not an appropriate case in which to grant certiorari because it does not involve an unsettled issue of state law. (Brief in Opposition, p. 11). Respondent's statement is in error.

The Sixth Circuit, in a significant misreading of Vance v. Schulder, 547 S.W.2d 927 (Tenn. 1977), cited Vance for the proposition that all contract actions for damages relating to the "devaluation" of property are subject to Tennessee's three year tort statute of limitations, regardless of whether the plaintiff's action sounds in tort or contract. Vance was a fraud case in which the Tennessee Supreme Court held that tort actions involving monetary loss resulting from the disposition of property for less than its value

are subject to Tennessee's three year tort limitation period. The Vance Court specifically stated that it was applying the tort statute of limitations because the "gravamen" of the plaintiff's claim was in tort, for common law deceit. Significantly, the Vance Court also stated that "the six (6) year [contract] statute would be applicable" if the claim had been for breach of contract rather than the tort of deceit. Vance, 547 S.W.2d at 931. The Sixth Circuit did not address the tort-contract distinction in Vance, nor did it follow the subsequent Tennessee Appellate Court decision in Harvest Corporation v. Ernest & Whinney, 610 S.W.2d 727 (Tenn. Ct. App. 1980), perm. app. denied (Tenn. 1980) pet. rehear denied (1981) which did distinguished Vance on this point.

Although the Sixth Circuit clearly admitted[1] that it was predicting state law, Respondent argues that this is not an unsettled issue of state law. In addition to admitting its prediction of state law, and misconstruing a Tennessee Supreme Court decision, the Sixth Circuit rejected the written opinion of the district judge and disregarded an available state appellate court decision on, Respondent argues, a "settled" issue of state law. As a result of the Sixth Circuit's actions, a split of authority now exists between the state and federal appellate courts on this issue in Tennessee. Litigants will now have the ability to forum shop until the Tennessee Supreme Court has the opportunity, which was denied to it by the Sixth Circuit, to finally resolve any apparent dispute concerning the application of the statutes of limitation to contract actions in Tennessee.

The Respondent also argues that the Sixth Circuit correctly denied the Tennessee Supreme Court the opportunity to address these issues because the repudiation issue was treated by the Sixth

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[1] Admitting its prediction, the Sixth Circuit stated that "we agree with the Seventh Circuit that Tennessee's highest court would impose..." the three year limitations period. Petitioner's Appendix, at page 7.

Circuit as an independent basis for reversal. Although this issue has not been directly addressed by the Tennessee Supreme Court, Tennessee appellate decisions clearly hold that the failure to repudiate a release, which is a form of estoppel, is an affirmative defense which must be timely asserted. Exum v. Washington Fire & Marine Ins Co., 297 S.W.2d 805, 41 Tenn. App. 610 (Tenn. Ct. App. 1955), cert. denied (Tenn. 1956). Because, under Tennessee law, the failure to repudiate a release may bar any claim subject to an otherwise avoidable release, it is an estoppel defense which is a matter of state substantive law. As such, it must be timely asserted as an affirmative defense in accordance with the federal rules of civil procedure pursuant to Erie.

Even if the repudiation issue were purely procedural, the Sixth Circuit clearly erred in relying upon it as an independent basis for reversal. It is undisputed that this affirmative defense was not asserted in Respondent's answer or even requested for inclusion in the pretrial order. The failure to timely present it waived it and precluded its consideration on appeal as a matter of federal procedure. F.R.C.P. 8(c); Macurdy v. Sikov & Love, 894 F.2d 818, 824 (6th Cir. 1990).

3. Petitioner's request for certification was not untimely.

Respondent argues that certiorari should be denied because the Petitioner's request for certification was untimely. Respondent's argument unfairly mischaracterizes the proceedings below. Petitioner prevailed on all of the present issues at trial and on the post-trial motions before the district court. Petitioner had no reason, prior to the issuance of the Sixth Circuit's decision, to foresee the strained interpretation of state law that the Sixth Circuit ultimately issued. Indeed, the prevailing law in the Sixth Circuit prior to Salve, which came down after the appellate briefs were

submitted, would have resulted in the Sixth Circuit's deference[2] to the district court's experienced interpretation of state law. This is not an instance in which the party moving for certification had multiple "bites at the apple," and then moved for certification after it was repeatedly unsuccessful in persuading the federal courts to adopt its interpretation of applicable law.

Respondent argues that "had Petitioner believed that the issue it now seeks to certify ... actually merited consideration by the Tennessee Supreme Court, Petitioner could and should have requested certification at the beginning of the appellate process." (Brief in Opposition, p. 16). Prior to the Sixth Circuit's decision, the law had been applied by the district court in a manner consistent with existing state cases and the general understanding of the practicing bar. Not until the Sixth Circuit's novel prediction of state law did the need for certification arise. Under these facts, Petitioner's request for certification was certainly not untimely.

CONCLUSION

The Respondent's argument fails to identify any significant justification for the continued absence of meaningful guidelines for certification, and underscores the need for this Court to re-examine the procedure and establish guidelines for certifying state law questions in diversity cases. For the reasons set forth herein and in its Petition, the Petitioner respectfully requests that this Court grant certiorari.

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[2] Prior to Salve, the position of the Sixth Circuit was stated as follows:

> "We generally defer to an experienced district judge's construction of state law, especially when as here that judge served as a state trial judge before appointment to the federal bench." Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988) re'hr g denied (1989).

Respectfully submitted:

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